

Public-Private Partnerships in Seattle



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Introduction

“Public-private partnership” has recently gained prominence as a term to describe a business relationship in which public and private resources are blended to achieve a goal or set of goals judged to be of mutual benefit both to the private entity and to the public.

Governments’ use of private contributions for public benefit is nearly as old as recorded history. In the city-state of Athens in the fourth century B.C., for example, prominent citizens made major contributions for staging costly public festivals and religious events and for building public buildings and monuments. “Partnerships” between government and private entities are not new to Seattle. Since the early 1900s, the Port of Seattle, functioning with considerable powers granted by the Washington Constitution and the broad mission of economic development, has engaged in a variety of public-private ventures. In the 1970’s various public development authorities (PDAs) were established to function as quasi-governmental agencies authorized and in fact, designed to use a combination of private and public (generally federal) money for “specific purposes and projects.” For many years Seattle’s Parks and Recreation Department has contracted with non-profit citizen advisory councils to help support and run a number of its facilities and programs.

What is a Public-Private Partnership?

Generally, any combination or blending of public and private resources can be called a “public-private partnership.” Seattle’s Office of City Auditor describes public-private partnerships as “collaborative arrangements between government and the private sector that involve the public partner paying, reimbursing, or transferring a public asset to a private partner in return for goods or services.” This study focuses primarily, but not exclusively, on the public-private partnerships as identified by a City of Seattle citizens’ advisory committee called the Public Private Partnership (PPP) Task Force. This committee, which was responsible for developing a new review process for public-private partnerships in Seattle, more narrowly defined public-private partnership as those that meet the following criteria:

- they involve \$5 million or more in city investment;
- they are directed toward the development of a physical space;
- they engage both the city and a private entity, which may include non-profit organizations;

- both the city and its partner have a financial interest;
- they involve projects that would not otherwise be provided by the private partner when the city is seeking benefits for the public.

In addition, any partnership that does not fit these criteria may be subject to the review process at the direction of the mayor or city council. Proposed projects that meet the above criteria, and therefore become subject to panel review, are called “targeted” public-private partnerships.

Lending of Credit – Constitutional and Legislative Limits for Public-Private Partnerships

The legal setting in which public-private partnerships are considered has evolved over the past several decades. Cities, counties, and municipalities in the State of Washington were historically constrained by the constitution’s “lending of credit” and “gift of public funds” provisions that generally prohibit government from giving public funds or lending public credit to private individuals or organizations, “except for the necessary support of the poor and the infirm.” Twenty years ago the Washington Supreme Court, concerned with a pattern of inconsistencies and exceptions in its previous rulings on the “lending-of-credit” provision, began to reexamine its prior interpretations of this provision. In a series of cases in the mid-1990s involving the Seattle Mariners baseball stadium and a parking garage in Spokane, the court articulated a rule which could be used to judge whether payments of public money to private entities would be constitutional. A Seattle legal expert has described the rule as follows:

The court has determined that a transfer of public money that benefits a person or entity that is neither poor nor infirm is not prohibited so long as there is no ‘donative intent’ on the part of the government entity. . . . If the transfer is not a gift, then it is not prohibited. To determine whether a payment is a gift, the court looks to whether the government will receive consideration in return. The court gives great deference to a determination by the legislative body of the government entity making the placement that the consideration is adequate. The courts will only review the determination of the legislative body and conclude that the transfer is constitutionally prohibited if the consideration is clearly inadequate.¹

¹ Jay A. Reich, *Private/Public Partnerships*, Preston Gates & Ellis LLP, 1999, p. 3.

Consequently, when a municipality plans to transfer public funds to a private entity for a purpose not necessary for the support of the poor and the infirm, it is well advised to “make clear findings with supporting evidence that it values what it is getting in return for the expenditure.”²

Local municipalities now have expanded latitude to apply their own judgment about whether a particular use of public money is appropriate and legal. The *CLEAN* decisions (Citizens for Leaders with Ethics and Accountability Now v. State) reflect the ongoing evolution in the way the Washington Supreme Court views the formerly strict limits of the “lending-of-credit” clause. Because the court held that the payment of public money to a private entity does not violate the constitution so long as the public agency making the payment has no “donative intent” (i.e., the agency does not intend the contribution of public money to be a “gift” but rather a payment for goods or services), the payment will not be regarded as constitutionally suspect.

In determining whether a payment is a gift, the court held that the legislative body’s calculation of the value of the public benefits that will flow from the proposed project is entitled to great deference. In other words, once a public agency has made a documented finding that there is an adequate “return on investment” for its contribution of public money to a venture that will benefit private parties, it has generally satisfied the test now required under the court’s current application of the “lending-of-credit” clause of the constitution. “The courts will only review the determination of the legislative body and conclude that the transfer is constitutionally prohibited if the consideration is clearly inadequate.”³

Economic Overview

Public-private partnerships are seen by many as creative ways to finance worthwhile projects in what many believe to be an increasingly tax-resistant environment. Additionally, local jurisdictions increasingly are asked to provide services which had formerly been funded with state and, more frequently, federal dollars. As fewer public dollars are available for financing and building necessary infrastructure, many local officials reason that without blending public and private resources, important and necessary projects could not otherwise be built. In one sense, public private partnerships, therefore, are seen as a

way for governments to achieve greater public benefit with scarce public funds.

From an economic perspective, there is nothing inherently good or bad about public-private partnerships. These arrangements can, however, become complicated and often controversial when there are crossover operational or ownership rights. When blending or blurring of public and private funds and interests occurs, it is often difficult to identify and separate the costs and benefits to the parties.

Politicians and government officials sometimes herald public-private partnerships as innovative ways to encourage capital investment “where it otherwise would not occur,” thus enabling them to provide more to the public than the public is willing to pay for in taxes. However, some critics view such partnerships as messy, risky, and too complex because they involve a number of different stakeholders with sometimes different or competing agendas. The availability for public purposes of otherwise inaccessible private funding or assets may be an equally serious problem, affecting the judgment of public officials in deciding whether to enter into the partnership

A public-private partnership, as well as any type of government activity involving an exchange of interests and assets, may be either desirable or a dangerous financial risk for either sector. The degree of risk depends upon how carefully those partnerships and the respective interests and obligations of the parties are organized and, sometimes most importantly, documented. Although economic efficiency is not necessarily the primary goal of a public-private venture, those projects that begin with clearly articulated objectives and in which the benefits, responsibilities, and risks are proportionally shared tend to be the most successful in yielding benefits and goodwill and in minimizing whatever controversy the project might otherwise raise.

Why Public-Private Partnerships?

A common argument in favor of more public-private partnerships is that activities and services, traditionally the responsibility of government, can be run more efficiently, in a more entrepreneurial fashion, and with less cumbersome government bureaucracy and waste, through the privatization of certain public facilities and services. This was the main purpose behind the unsuccessful proposal to create a public development authority to govern the Seattle Center in the mid-1980’s.

² Jay A. Reich, *Private/Public Partnerships*, Preston Gates & Ellis LLP, 1999, p. 3.

³ *Ibid.*, p. 3.

Another argument frequently advanced for the type of public-private partnership in which the private non-profit partner manages public facilities is that a private non-profit organization is better able to raise funds from the private sector. Seattle's Woodland Park Zoo and the Seattle Aquarium are good examples. The Seattle Parks Department is in the process of forming partnerships with private non-profit organizations for managing these facilities.

Under these partnerships, the city would retain ownership of the property, but management and control of the facilities would become the responsibility of the private non-profit Woodland Park Zoological Society and Seattle Aquarium Society. As popular regional attractions, the zoo and the aquarium provide services and benefits to visitors who live far beyond the city limits. These non-profit societies have demonstrated that they can raise money more effectively for operations and needed capital improvements from a wider pool of both public and private sources, relieving the city of much of its current heavy funding responsibility for these facilities.

Partnerships between government and private business are often promoted as a way to stimulate economic development by encouraging private investment in local businesses that create jobs and increase local tax revenues. The Galer Street/Immunex Flyover (an overpass designed to provide access to the facility) is one example of a public-private partnership that was encouraged because of the anticipated value of new tax revenues and other economic benefits. In an effort to keep high wage jobs from moving out of Seattle and to lure more of them in, the city joined with the Port of Seattle, King County, and some federal agencies to finance an access ramp to the Immunex Corporation's \$450 million complex at Pier 88. Immunex and its jobs have so far stayed in Seattle, but the cost for the access ramp has increased from its original estimate over the past few years. Local government is bearing the entire cost of those increases.

Many successful urban development and redevelopment projects would not happen without the creative mix of public and private funds. While highly criticized by some, Pacific Place Garage is now claimed by its supporters to be a financial success for both the public and private developer and is credited with contributing to the revival of Seattle's downtown retail business district.

Why Not Public-Private Partnerships?

As varied and compelling are the reasons are which favor more public-private partnership ventures, these projects are also met with skepticism by many people. Critics assert that the public's contributions are often misrepresented or undervalued and that the public costs and benefits are not always clearly identified or articulated in a way that enables the public to understand what it is giving up or gaining from such partnerships.

Critics cite examples where government, sometimes under pressure, enters into risky partnership agreements on behalf of the public without carefully negotiating contracts. In documented cases, carelessly negotiated agreements have led to unfortunate consequences in which taxpayers are either forced to pick up the tab for "cost overruns or unanticipated costs," as in Galer/Immunex partnership, or end up paying legal expenses in an attempt to avoid them, as with the Mariners stadium.

Critics also contend that partnerships are sometimes more *private-public* or *political-private* than public-private in nature, adding that some projects are neither initiated by public demand nor considered to be essential public necessities. Two major public-private partnerships under consideration by the city (South Lake Union Redevelopment and the Seattle Aquarium) raise additional public concern because they include elements that were rejected by voters in previous elections. This concern underscores the need to define and articulate clearly the public benefits to be gained by the partnership and then to ensure that the project and its benefits are consistent with adopted public goals and plans.

Other concerns citizens have about public-private partnerships:

- loss of public control over valuable public assets;
- lack of public oversight and meaningful citizen input;
- additional undisclosed costs imposed on communities resulting from unmitigated cumulative impacts of a development;
- negotiated deals that have been finalized long before the public is fully informed. Citizens express the desire to be involved during the early stages of developing partnerships when their comments and suggestions can make a difference.

Successful Public-Private Partnerships

In September 1999 the Seattle City Auditor prepared a report called "Effective Public Private Partnerships" based on a survey of public-private partnerships in Seattle, as well as in other jurisdictions. This comprehensive report pointed out many of the inherent risks associated with public-private partnerships for both the public and private sector, as well as some of the lessons that can be learned from "unfavorable bargains."

Lessons learned include:

- the need for early detection and assessment in order to reduce the public partner's potential risks;
- the importance of scrutinizing the fine print of the partnership agreements;
- the importance of maintaining the ability of the public partner to walk away from sales pitches that camouflage the actual costs and risks of the partnership proposition;
- the need to protect the taxpayer's interest by developing a partnership agreement that requires the private partner to pay the fair market value of any purchased or leased property;
- the need to ensure the contract contains strict provisions to ensure that the public will have reasonable access to and use of any donated property.

Steps towards successful partnerships:

The auditor's report concluded that there are a number of steps that should be taken when government considers entering into a partnership agreement with the private sector. These include:

- clarifying the public objectives of partnership arrangements and ensuring that they are specified in the agreement;
- identifying financial exposure, negotiating contract safeguards, and investing in the necessary expertise for negotiating;
- designing a careful and competitive selection process;
- setting and enforcing contractual performance standards;
- being prepared to walk away when red flags signal trouble ahead.

City Auditor's Recommendations For Effective Public-Private Partnerships

- Identify the major elements of public-private partnership projects and develop review criteria that ensure that the city's and the public's objectives are adequately addressed, particularly the legal, environmental, financial, design, and political issues.
- Develop streamlined procedures for notifying the public about proposed partnerships. Consideration should also be given to routinely posting information regarding proposed partnerships on the city's website. Information should include the nature of the public-private partnership, primary objectives, the private partners, city resources to be committed to the project, and the significant benefits and risks associated with the project.
- Develop public involvement procedures that balance the city's requirements for citizen input on proposed public-private partnerships with the private partners' interest in timely investment of private resources. Ample opportunity for public review and comment should be provided at formal council hearings, especially if earlier public meetings were not scheduled. Decision makers should weigh public input before the decision is finalized.
- Encourage open competition among prospective partners whenever possible (e.g., requests for proposals) to maximize the economic benefits of the partnership arrangements, and discourage competition (where two or more public entities bargain against each other for the honor of being partnered with the private entity) with other local governments and among city neighborhoods.
- Develop a policy to ensure that the financial information required from the prospective partners is protected, with the exception of financial information that directly pertains to specific public-private agreements.

Public Disclosure and Public-Private Partnerships

The public's right to know about government's financial activity under Washington's Public Disclosure Act poses a difficult dilemma for public-private partnerships. Ideally, an open public process is preferred and mandated when the city is considering spending citizens' tax dollars on any publicly financed project. In reality, no private party will sit down to negotiate a contract with the city if the negotiations are open to the public. This is a problem posed by public-private partnerships and is the source of great controversy.

For mostly good reasons, city politicians and officials negotiate public-private deals behind closed doors in an effort to protect the privacy of the private partner's finances. We are also told that in real estate transactions, quiet and private negotiations are in the best interest of the public because they avoid unnecessary land speculation. Only after these negotiations have been finalized does the public have access to documents. A common citizen complaint is that the city is over-indulgent in its application of confidentiality, using the "attorney/client privilege" and the mask of "sensitive negotiations" to erect barriers to public scrutiny.

Closed-door negotiations provoke public suspicion, especially if citizens feel they are not getting a good deal for their tax dollars. If the details of an agreement are announced to the public after they have been finalized, citizens do not have any bargaining power if they are not happy with the terms of the agreement.

Even members of the Public-Private Partnership Review Process (4P) Citizens Advisory Panel, described in the following section, struggle with the dilemma of how much and when information should become public. In the full panel meeting notes of the public-private partnership review of January, they express concern that, by the time projects are brought to the panel for review, they are already "done deals" and "too far along in the process" for the panel to add value. Panelists have expressed their concern that they be involved in the early stages of negotiations so that they can provide an "impartial pair of eyes on a deal." At the same time, panelists are also uncomfortable with idea of having access to confidential materials. They fear that by doing their work behind closed doors they become part of the problem and vulnerable to public criticism (a burden that should not rest entirely with an all-volunteer advisory committee).

Ultimately citizens depend upon our elected officials and public servants to negotiate agreements on the public's behalf. Given the enormous pressure from financial contributors and major institutions for approval of their projects on favorable terms from the city, taxpayers also want to make sure their interests receive fair consideration.

Seattle's Process for Handling "Targeted" Public-Private Partnerships

Task Force

In 1998 Mayor Paul Schell and Seattle City Council President Sue Donaldson convened the "Public-Private Partnership Task Force" to act as a citizens' advisory committee. The charge of this committee was to create a set of standards for reviewing "targeted public-private partnerships." For ten months, committee members deliberated on presentations and comments on the subject made by city staff, community members, citizens, and private developers. In September 1999 the task force presented its recommendations to the mayor and city council in its report "Shaping Public-Private Partnerships in Seattle."

The review process as outlined in the task force's report consists of two main components: a partnership review protocol and a project panel.

Partnership Review Protocol: The protocol is a two-part document that contains two sets of questions. The first set, which constitutes the protocol's cover sheet, provides basic project information (overview, profile of partner's proposed timetable, and financial transaction analysis). The second series of questions, designed to describe and calculate the public benefits and risks associated with the proposed partnership, covers the following five sub-categories for project review:

- project's relationship to city priorities;
- anticipated public benefit from the project;
- assessment of related impacts on the community;
- conformity with state and local laws;
- opportunities for citizen engagement.

The completed protocol, to be prepared by the mayor's designee, will be made available to the council, news media, organizations, citizens, and all other interested parties, and will be posted on the city's website.

Project Panel: A citizen review panel is composed of 15 members, five appointed by the mayor, five appointed by city council, and five appointed by the ten appointed panelists. This pool of panelists self-selects a subgroup with a minimum of five members to review and comment on a "targeted partnership." The task force had recommended that the panel be appointed through a method which "guarantees the independence of panel members and the integrity of the process, and . . . requires only modest provision of staff and support services."

In November 1999, the city council adopted the task force recommendations through Resolution #30072 as “the process” for reviewing and participating in targeted public-private partnerships. The city officially began the review process on a one-year trial basis, as specified in the task force’s recommendations in January 2000.

Public-Private Partnership Review Process (4P)

Work of the Panel: The purpose of the 15-member 4P Panel is to assist city departments, council, and the public in evaluating the expected public benefits of targeted projects. The first ten members (mayoral and city council delegates) were appointed in March 2000, in time to review certain aspects of the South Lake Union property redevelopment and sale. In April 2000 five more members were chosen by the existing panelists. The complete 15-member panel met for the first time in May 2000. Between May 2000 and January 2001 the committee met approximately every six weeks.

To date, the panelists’ work has been to appoint five additional members to the panel (for a total of 15), select a chair and vice chair, adopt a set of guiding principles, adopt a set of bylaws, develop an internal code of ethics (conflict of interest, public disclosure, and gifts or loans), discuss the panel’s mission, and review two targeted public private partnerships—the Admiral Parking Garage and the proposed South Lake Union Redevelopment project.

Partnerships subject to Panel Review: Table A (on page S-11) illustrates six projects that, in most cases have fallen within the task force’s review parameters. One project, Pacific Place Garage, is not a project that was subject to review. It was included in this chart because it was one of the important public-private partnerships that triggered the need for a review process. Although six targeted public-private partnerships have been identified since the original task force developed a set of standards in November 1999, only two projects, South Lake Union Property Redevelopment (review in process) and the Admiral Garage (review completed), have been subject to 4P Panel review since its inception eight months ago.

Challenges of 4P Panel: In reviewing the minutes of the 4P Panel’s nine months of meetings, it is apparent that the review process is not working well and is in need of revision. This statement, however, does not reflect upon the commitment, intelligence, or integrity of the members of this all-volunteer citizen panel. To the contrary, the panelists deserve recognition for their

ability to identify objectively the flaws in the current process. Some of the concerns voiced by panelists are that:

- there needs to be more clarity about who the clients of the panel actually are;
- projects are brought too late to the panel, after essential decisions have been made;
- insufficient information is provided the panel to make informed recommendations;
- providing the panel with confidential information puts the panelists in an awkward position and reduces public trust;
- in seeking specific technical advice in the latter stages of a project, the city puts panelists in the position of providing free consultant services;
- the panel process seems to lack uniformly consistent support from city officials;
- to be successful, the panel needs more direction in its role and a clearer framework in which to work.

Future Directions: Based upon comments and frustrations voiced by the various members, the panel unanimously agreed to:

- complete the review of South Lake Union;
- draft a formal memo for the mayor and city council with examples of both appropriate and inappropriate projects;
- not convene again as a full panel until there is a reason to do so.

The next task for the 4P Panel will be to prepare a formal report to the mayor and city council, which will evaluate and summarize suggestions and comments from city council, the mayor, city staff, the public, and members of the original task force that developed the process. This report will recommend either continuing the process with suggested changes or dissolution of the panel.

- A Case Study -

TOLT DESIGN-BUILD-OPERATE (DBO) TREATMENT FACILITY – A Focused Partnership

The Tolt DBO is a textbook example of a successful public-private partnership where all the necessary steps were taken to make this a good deal for the public.

The Tolt reservoir currently provides water to 1.3 million people (a third of the city's water supply). Initially, when the city determined it needed a new water filtration facility, it planned to follow the traditional practice of building the system through a competitively bid contract process. The city anticipated that it would cost \$156 million, \$100 million in construction and \$56 million in operations and renewal over 25 years.

As the city was about to enter into a final agreement for this project, new legislation was enacted that authorized municipalities to use an alternative public-works contracting method. Seattle Public Utilities (then Seattle Water Department) quickly switched gears in response to this legislation because it determined that there would be substantial benefit to ratepayers if the city adopted a DBO contracting method.

DBO differs from conventional public-works contracting because it requires performance specifications that describe desired outcomes and asks proposal teams to develop their own ideas on how to achieve these goals. The purpose of a DBO is to encourage teams to use their "entrepreneurial initiative" in designing the best project.

The city, which is responsible for providing a safe and reliable water supply, owns this public resource and is financing the project. The DBO team (consisting of designers, construction contractors, contract operators and support firms) manages the design and construction and assumes the risk for coordinated project implementation. After the system is built, the DBO also takes responsibility for operating the plant, training staff, implementing a detailed operations and maintenance plan, and guaranteeing the operational performance of the facility.

The city's capital cost for this project is \$76 million which includes DBO permitting, design, and construction. Operational costs are estimated at \$36 million for 25 years.

What made this highly complicated public-private partnership so successful is that the city through council action invested in the necessary expertise (a high level team of water-quality engineers, policy, financial, and administrative experts) to negotiate the contract with the private partner. As a result, the citizens of Seattle will have the most reliable and efficient technology in water treatment at the lowest cost.

- A Case Study -

**SOUTH LAKE UNION –
Public-Private Partnership or Real Estate Sale?**

Background

The City of Seattle secured 10 parcels of land in the South Lake Union (SLU) area for developing the Bay Freeway, which was voted down in 1972. The city retained the properties, purchased with state and federal funds, and leased them to various businesses. In 1994/1995 the Seattle Commons Proposal emerged, which proposed to incorporate some of the city parcels into a park extending north from Lake Union to Denny Avenue in conjunction with major transportation improvements, including resolution of the street congestion by widening and lidding Mercer Street and making it a two-way corridor. This too was voted down. Parcels that Paul Allen had acquired and intended as a contribution to the Commons reverted to Allen, who then continued to purchase other properties in the South Lake Union area.

In 1998 a group, consisting primarily of business and property owners and including representatives from Vulcan Northwest (the city's partner in developing the properties) was formed to prepare the South Lake Union Neighborhood Plan. The city council adopted the plan in March 1999. Some members of this group (called SLUP.com) considered the city-owned parcels to be a blight on their area and were interested in promoting a change of ownership. The plan expressed a preference for the redeveloping of the properties into a "cultural corridor" and gateway, connecting South Lake Union with the Seattle Center area and providing a "front door" to the city from I-5.

In correspondence between Vulcan Northwest and the South Lake Union Neighborhood Planning Committee dated November 5, 1998, Vulcan urged the group specifically to include in the plan recommendations to raise the zoned height on the parcels fronting Valley Street. Vulcan's argument was that the high groundwater table made structured parking difficult and the extra height would be required for economic feasibility of development at that location. The plan, however, did not request zoning or height changes, but did allude to the possible need for modifications. Because there were no zoning changes recommended, the plan was not subject to an environmental impact statement.

P4 Review – What's the Big Hurry?

In November 1999 the city council passed Resolution 30072 establishing the 4P process and protocol. That same month the council passed Resolution 30080 which authorized the process of disposing of the surplus city-owned properties in South Lake Union. Resolution 30080 outlined in general terms a list of "public benefits" desired from the transaction. None of these were quantified, but high on the list was the provision of parking associated with the development of South Lake Union Park. Resolution 30080 specifically called for the creation of a separate South Lake Union five-member panel in the event that the anticipated official 4P subcommittee was not in place before March 15, 2000. Although the subcommittee was never formed, it was recognized in a city council memo dated December 7, 1999, that "allowing the project to proceed at its own pace" could result in "not involving the PPP Panel soon enough to provide meaningful participation."⁴ In this case the pace of the project was set by the mayor, calling for a short list of developers to be in place by March 31, 2000, to avoid missing the then-hot real estate market.

⁴ Memo from Bill Alves, Council Central Staff to Members of the Business and Economic Development Committee, Subject: Decision Agenda on Development of Surplus South Lake Union City Properties.

Getting Off on the Wrong Foot

As a result, there was no 4P involvement in the earliest decisions about:

- how the property would be disposed of, whether by sale or lease;
- whether all the properties should be bundled together or some considered separately;
- how public benefits – beyond the income from either a sale or lease – could be prioritized or quantified;
- how the disposal of the city’s parcels should fit into the larger picture of public investment and benefits for the South Lake Union Park and the general area;
- how partners would be solicited, either by request for qualifications or by requiring specific proposals or other means.

When the panel had its first briefing on March 31, 2000, the city had already invested more than \$500,000 in outside real estate, urban design, and preliminary engineering services related to the property disposition and had decided to accept the results of the Requests for Qualifications (RFQ) process (only one proposal, Vulcan’s, was received). The panel was not invited to advise the RFQ Selection Committee or the oversight committee, although this would have been possible because the oversight committee did not make its decision to enter negotiations with Vulcan until April 26, 2000.

At their second briefing, on September 6, 2000, panelists were told by city staff that the project was no longer considered a true public-private partnership, but a “conditioned real estate transaction.” The chair of the panel asked how the panel could evaluate public benefits if they would not even know what land uses were being proposed by Vulcan. Minutes from the panel meetings indicate a persistent confusion over the role of the panel, uncertainty about what value it can add to the process, or whether it was merely rubber-stamping “done deals.” The council also questioned whether or not it “works” for the city council, the mayor, or even city staff. Also at issue was what information about the negotiations it should have access to and when.

Who Controlled the Schedule?

In hindsight, it appears that the RFQ process could have waited a few months for the panel to be established. This might have allowed the panel to evaluate the transaction objectively and help establish guidelines for it. Vulcan’s interests may also have influenced the schedule. The September 6 panel meeting minutes include this remark by Jim Rheinhardsen, a consultant to the city:

The city could simply sell the properties subject to the entire regulatory process, but early on Vulcan suggested that the city do an earlier closing of the transaction.

As of this writing, the final South Lake Union panel meeting has not been scheduled and the city was still waiting for a response from Vulcan on details of the transaction in negotiation since April 2000.

- A Case Study -

THE SEATTLE AQUARIUM – A Breakdown in Public Oversight

Within the next year or so, the Seattle Department of Parks and Recreation (DPR) is expected to turn over management and control of the Seattle Aquarium to a non-profit organization, the Seattle Aquarium Society (also known as SEAS). Currently the aquarium is owned and operated by the City of Seattle under DPR. SEAS is the major non-profit fundraising organization that takes the lead in soliciting contributions and grants for the aquarium from major corporations, individuals, and foundations. SEAS also promotes and supports many of the educational and recreational functions of the aquarium through the sale of memberships and a quarterly newsletter. Without the fundraising and program support from SEAS, the Seattle Aquarium would not be the popular regional public resource it is today.

Faced with increasing demands for park improvements, maintenance, and recreational services, the DPR asserts that the aquarium is a drain on its budget and would prefer to turn over most of the financial and management responsibilities of the facility to SEAS. This seems like a reasonable solution, since the aquarium is a regional facility that attracts visitors from within and outside the City of Seattle. Requiring only Seattle residents to subsidize this facility is an unfair burden on Seattle's tax base.

On its face, a management agreement between the non-profit SEAS and the city appears to be a good fit for the aquarium (much like the Tolt DBO organization), where the public owns the land but the private sector raises the money needed to manage and operate the facility. Unfortunately, this scenario is complicated by the fact the contract between the city and SEAS not only gives SEAS exclusive ownership rights to the existing aquarium, its contents, and the highly valued "naming rights," but also gives SEAS a \$22 million contribution of public money from the city towards a new aquarium that SEAS will design and build.

Plans for this proposed new aquarium have been in process for nine years. For the most part, however, Seattle citizens were not aware that the city either needed or was planning to build a new aquarium. During this time, the plans for a new aquarium were discretely presented and disseminated. Language in the original 1994 Central Waterfront Master Plan for the new Seattle Aquarium says that "the scope and need for the project should be determined before it is taken to the public and the press." A document called the "Implementation Plan for the Pacific Northwest Aquarium" states that the financing plan should include a "quiet campaign" that identifies government funding sources, timelines, and funding cycles. Very few citizens commented on the "Programmatic Draft and Final Environmental Impact Statement for the Aquarium and Central Waterfront Plan." On January 10, 1996, a Final EIS public hearing for the project was scheduled to last two hours but was adjourned in one hour because only seven citizens attended. In 1998 SEAS used a by-invitation-only program charrette which served as the basis for an update/addendum to the original 1994 Central Waterfront Master Plan.⁵ The League of Women Voters was not invited. Although presentations about the new aquarium were made to various civic groups, at this late stage in the planning process there was little opportunity for citizen involvement.

In the spring of 2000, when the citizens realized that a new \$200 million aquarium on Seattle's Central Waterfront could possibly compromise public views and access to a public shoreline, they became increasingly concerned about the details of this project. Whether citizens were at fault for not following the project since its inception or whether the city intentionally discouraged the public from participating in the planning process is an ongoing debate.

Just as the city council was about to appropriate \$22 million in taxpayer dollars for this project and sign a good faith agreement with SEAS, citizens began to ask questions. One of the biggest concerns raised by citizens was that the majority of council members agreed to sign a partnership agreement with SEAS that both appropriated

⁵ A charrette is an activity where the participants are assigned a very complicated design problem and are expected to bring it as close to completion as possible within a short period of time.

funds and outlined terms for transferring control of the facility to SEAS without first requiring it to be reviewed by the 4-P Panel. Citizens were upset with what appeared to be a rushed city council decision lacking appropriate public oversight. Even council's assurances that the agreement would be subject to 4-P review after the fact did not quell citizens' distrust.

When the details of the aquarium agreement were finally presented to the 4-P Panel, the panel refused to review the project because it was already a "done deal" and too far along in the process for meaningful review. The panel did not want responsibility for rubberstamping the council's decision (especially if the panel were to determine, after-the-fact, that it was not a good decision).⁶

Private management and control of the aquarium may be in the best interest of the public, but asking city council to put this project through the review process was not an unreasonable citizen request. The aquarium and the priceless public shoreline that it sits on are valuable public assets. Citizens do not want the stewards of our public property (city council, the mayor, and the parks superintendent), to give away control of the use of the property, without public process, especially when the public trust is at stake. The public distrust of how and why this project has managed to elude public scrutiny and 4-P review led to threats of an initiative by a citizens' group.

Since city council authorized the signing of the Memorandum of Understanding, the pace of the project has slowed. The Memorandum of Understanding, a good-faith agreement that identifies the terms of a final agreement, depending upon SEAS's ability to reach a certain fundraising threshold. SEAS and the Parks Department realize that this project needs more public support and less controversy in order to move ahead with a successful fundraising campaign.

Outstanding issues:

- How the final contract will be reviewed and who will review it are looming questions. The 4-P Panel declined to review the project, yet the aquarium was named in Resolution 30118 as a targeted partnership. The city council must either undo legislation or review the project without panel oversight.
- A number of controversies surrounding the siting and design are being resolved as a result of citizen pressure.
- SEAS must prove that it can raise money both privately and publicly for one of the most ambitious non-profit private funding efforts for a capital project in the history of Seattle. SEAS and the DPR anticipated the Port of Seattle, King County and the State of Washington would, in combination, contribute \$36 million to this project. These three governments have indicated that this is unlikely to happen due to other funding priorities.

⁶ Full Panel Meeting Notes, Public Private Partnership Review, January 2001.

- A Case Study -

PUBLIC-PRIVATE PARTNERSHIPS IN SAN DIEGO

San Diego has many things in common with Seattle, including rapid growth, a burgeoning economy, many attractions for tourists, a vibrant, healthy downtown, and an increasingly skeptical citizenry regarding public-private partnerships.

Other commonalities include stadium arrangements which have generated great controversy, along with the perception of overly generous public support to privately-owned baseball teams, and major issues about airport expansion or relocation. San Diego residents are also upset about stalled or otherwise apparently mishandled public-private development projects relating to waterfront hotels, port and city developments. Citizens are expressing anger and cynicism towards these projects.

Proposed Charter Amendment: To address these concerns, San Diego's previous mayor brought forth a proposal several years ago to amend the city charter in order to allow citizens to vote on certain proposed public-private partnerships. The proposed charter amendment would have established a monetary threshold triggering the public vote, which threshold would have been calculated based on the value of the project as a percentage of the value of the city's capital improvement program (CIP) as a whole. The debate centered on whether projects needed to be worth at least 10% of the CIP (or more, or less) in order to cause them to be placed on the ballot.

The proposal was debated but never acted upon by the city council, which instead promised to ensure that projects of a certain magnitude are indeed brought before the voters. However, the proposal seems to have been forgotten, has not resurfaced, and has not brought about any public votes on pending public-private partnerships.

Privatization: In the past few years, San Diego County has privatized a number of its services. Some years ago it privatized its waste-management services. When the arrangement did not work out as planned, the entire operation was sold to the private sector. More recently, the county has privatized both its mental health operations and its entire data-processing function. League observers have reported that neither has worked well and, in the case of the data processing, the results of the change have been "major problems and breakdowns."

It has been noted by a League of Women Voters observer in San Diego that it cannot be expected that shifting public functions to the private sector will result in improved service. These services were originally done by government because they were not appealing to the private sector as they were not particularly profitable. Privatizing these services can work for the private sector only if they can be made profitable, which very likely would entail reducing services.

Zoo Expansion Proposal: The world famous San Diego Zoo is run by the San Diego Zoological Society. Its 123 acres are on land in Balboa Park owned by the City of San Diego and leased to the society for \$1 per year. In July 1999 the society aired plans to expand the zoo beyond its leasehold boundaries by 24 acres, using land currently occupied by the Spanish Village (a series of artists' studios), an antique carousel, a War Memorial building, and the large parking lot used mostly by zoo visitors but technically a part of the surrounding Balboa Park.

In order to legally implement the proposed changes, the Zoological Society had to receive a city Community Master Plan Amendment which, as a discretionary decision, ultimately needed city council approval. The plan was first presented to a preliminary public hearing before the planning commission, at which it was greeted by several hundred fervent protesters and opponents. Among all the negative reaction, the most ardent came from war veterans, who felt that the loss of the war memorial building to a proposed zoo expansion was particularly egregious. The veterans were joined in their opposition by many groups and individuals, including the League of Women Voters of San Diego, which based its opposition on positions calling for no net loss of open space and free access to the city's remaining parklands.

The city and the Zoological Society officials duly took note of the size, passion, and diversity of the opposition.

At the next public hearing on the expansion, an announcement was made by the city council member chairing the meeting that the expansion plans had been shelved and that the city and Zoological Society had jointly hired a mediation team to work with citizens in developing alternative options for expansion. After meeting individually with about 60 of the stakeholders who had spoken out on the proposal, the mediation team issued a "Convening Report" recommending a major public involvement process featuring a diverse working group of 40 stakeholders. Participants were identified in the report. This process was designed to allow all perspectives to be heard and to attempt to identify alternative expansion options.

The working group met twice monthly for nearly a year. Subcommittees worked on such items as setting agendas and establishing working rules for the group. The process was heavily staffed by both the city and the Zoological Society. The meetings were facilitated by a professional facilitator. Many meetings featured presentations by the stakeholders themselves, explaining their particular interest in Balboa Park and their perspective on the zoo expansion. Several Saturday meetings featured tours of the zoo and surroundings, and extensive briefings on the entire transportation and parking issue related to the park and zoo. There was also a day-long non-invitational design charrette attended by the working group and 180 members of the general public. The charrette produced 16 different design proposals but no full-fledged expansion options. The closest any came to allowing for zoo expansion was the idea of using a portion of the existing surface parking lot for underground parking, while allowing the rest of the current lot to be used for expansion.

After the working group had finished its task and produced a report on its work, it was generally understood that the Zoological Society would produce a more viable expansion proposal.

Recently the Zoological Society's consultant has been meeting with individual members of the working group, introducing an outline of a new proposal which entails underground parking beneath the Spanish Village, freeing up the entire area of the current parking lot for zoo expansion. Margaret Engels, the League of Women Voters representative who served on the working group, attended such a meeting. She expressed concern that this proposal was outside the scope of what the working group had agreed to. When she voiced this concern the consultant assured her that "Others seem to like it." The San Diego League believes that this fragmentation of the working group's ability to respond to the new proposal is inappropriate. The League is writing a letter to city and zoo officials formally protesting the process and withdrawing its name from the proceedings. The League believes a more appropriate process would be to reconvene the working group in its entirety in order to introduce the new proposal to the complete group. In that way, the group members could communicate among themselves and determine whether the new proposal was acceptable.

The contract between the city and the Zoological Society is of many years' standing and does not include requirements that the Zoological Society involve the public when it develops major changes to the zoo's capital facility or operations. Many observers believe that the whole controversy could have been avoided, together with all the time, energy, and resources expended by the working group process, had the Zoological Society done a more extensive job of public outreach as it developed its expansion plan. The working group process was an interesting opportunity for zoo and city officials and the public as a whole to learn more about the various interests and agendas of the stakeholders, but it was also, in the opinion of the League representative, "inefficient, energy-consuming, and wasteful."

Perhaps as Seattle negotiates contracts with the zoo and aquarium societies, and contemplates future partnerships with the private sector for the management and control of its public facilities, San Diego's experiences should be kept in mind.

*- Appendix I -***DEFINITION OF TERMS**

Strategic Capital Agenda – The Strategic Capital Agenda outlines the most important capital issues facing the city, explores options for financing, and describes possible capital projects that will be submitted to the voters for funding. It is intended to support the city’s objective that citizens get their money’s worth from city government by explaining options and priorities for capital activities.

Criteria used in selecting capital priorities and projects include preservation of existing facilities, investment in facilities that support the Comprehensive Plan, implementation of neighborhood plans, support for economic development, leveraging of external funding sources, and consistency with the city’s debt policies. The Strategic Capital Agenda also identifies specific projects.

Capital Improvement Program (CIP) – The CIP allocates existing funds and anticipated revenues to rehabilitate, restore, improve, and add to the city’s physical plant. The CIP covers a six-year planning horizon, but is updated each year to reflect ongoing changes and additions. The document, prepared by the City Budget Office based on submissions from departments, is approved by the mayor, and is then submitted to the city council for approval, along with the city’s annual budget. The six-year CIP does not appropriate funds, but rather functions as a budgeting tool, supporting the actual appropriations that are made through the adoption of the budget. Public-private partnerships and their preliminary budgets and schedules are likely to show up in the CIP.

Council Resolution – A resolution is city legislation which is administrative or temporary, or which expresses policy. Resolutions are passed by the city council only, but the council may request the mayor’s signature as endorsement of the policies contained within them. Resolutions also may serve as backup material or preliminary policy in preparation for drafting.

Resolution 30072 states how the city council identifies public-private partnerships:

Targeted partnerships subject to review should be limited to partnerships that have been identified as a targeted partnership by the city council in a resolution in which the city is engaged in a partnership with any of the Development Authority; where the city is seeking benefits for the public that would not otherwise be provided by the private entity; and where both the city and its partner have a financial interest. The city council shall identify by resolution “targeted partnerships” for the next calendar year prior to year-end. The council may identify additional targeted partnerships by resolution during the year.

- Appendix II -**BIBLIOGRAPHY****CITY OF SEATTLE REPORTS**

- Central Waterfront Master Plan, The Seattle Aquarium Society, 1994.
- Central Waterfront Master Plan, Final Programmatic Environmental Impact Statement, City of Seattle, Department of Parks and Recreation, 1996.
- Central Waterfront Master Plan Addendum, Program Charrette, The Seattle Aquarium Society, 1998.
- City of Seattle Adopted Strategic Capital Agenda, 1999-2004.
- City of Seattle 2000-2005 Adopted Capital Improvement Program, 2000.
- Effective Public-Private Partnerships, "Performance Perspective," a periodic newsletter issued by the Seattle Office of City Auditor, September 3, 1999.
- Full Panel Meeting Notes, Public-Private Partnership Review, January 2001.
- Implementation Plan for the Pacific Northwest Aquarium, Pacific Northwest Aquarium – Preliminary Master Schedule, no date.
- P4 Panelist Handbook, Overview, Responsibilities, and Background materials for P4 Panelists, March 13, 2000.
- P4 South Lake Union Meeting Notes, Public-Private Partnership Review, March, 2000.
- Report on Seattle's Public Corporations, Strategic Planning Office, November 1999.
- Shaping Public-Private Partnerships in Seattle, A Report to the Mayor and City Council from the Public-Private Partnership Task Force, Facilitated by the Daniel J. Evans School of Public Affairs, September 28, 1999.
- Shaping Public-Private Partnerships in Seattle, Minority Report, Daniel Norton, Brian Livingston, September 27, 1999.
- South Lake Union City Property Redevelopment, PPP Review Responses to RFQ, March 2000.
- Tolt Treatment Facility DBO, Capital Improvement Projects, Seattle Public Utilities, 1999.
- Urban Politics # 64, Councilmember Licata's e-mail Newsletter, 2000.

LEAGUE REPORTS

- Public Development Authorities in Seattle, League of Women Voters of Seattle, May 1989.

NEWS ARTICLES

- The Seattle Times, "Purveyors of Public Funds, Holders of our Trust, Must Say No Sometimes," May 1998.
- The Seattle Times, "Following the Seven Habits of Public-Private Ventures," August 1998.
- The Seattle Times, "Referendum a Powerful Tool," August 1998.
- The Seattle Times, "Get Clarity, Disclosure in the Public's Deals," July 1999.
- The Seattle Times, "Secrecy in Spokane," July 1999.
- The Seattle Times, "Design Work Begins for Five-Story Hilton West of Seattle Center," August 1999.
- The Seattle Times, "Put Aquarium Through Public-Private Review," February 2000.
- The Seattle Times, "More Taxes Flow From Revitalized Downtown," March 2000.
- The Seattle Times, "Garage May Get Another Look," January 2001.
- The Seattle Times, "West Seattle Developer Agrees to Add Parking," March 2001.
- The Seattle Post-Intelligencer, "Licata Seeks Oversight of Deal for Aquarium," February 2000.
- The Seattle Post-Intelligencer, "Citizens Development Panel Accused of Lacking Skeptics," March 2000.

PERSONAL INTERVIEWS

Norma Damashek, Chair, City Issues Committee, League of Women Voters of San Diego, telephone interview, April 8, 2001.

Margaret Engels, Operations V.P., League of Women Voters of San Diego, telephone interview, April 7, 2001.

Mary Jean Ryan, City of Seattle, Office of Economic Development, fall, 2000.

Nathan Torgleson, City of Seattle, Office of Economic Development, 2000 and 2001.

Sandra Teasley, City of San Diego, project manager for proposed zoo expansion, telephone interview, April 6, 2001.

Steinberg, James, "Public Gets Voice on Zoo Expansion," San Diego Union-Tribune, February 8, 2000.

PRIVATE STUDIES

Private Gain, Public Pain, Kim Diehl, Keith Ernst, Daphne Holden: The Institute of Southern Studies, Durham, NC, February 2000.

Private/Public Partnerships, Jay A. Reich, Preston Gates & Ellis LLP, 1999.

Tax-Exempt Financing by Nonprofit Corporations, Alternative Financing Methods, Cynthia M. Weed, Preston Gates & Ellis LLP, undated.